

EPA Comments in plain font

*EPA Proposed Changes to IAOC, RIFS SOW, and RDRA SOW language in plain italics*

*NDEP Responses in underline italics*

*NDEP Proposed Changes to IAOC, RIFS SOW, and RDRA SOW language in red underline italics*

## GENERAL COMMENTS

### A. Remedy Selection

1. Groundwater OUI: EPA concurs with NDEP's proposal to add to the IAOC language from the Deferral Agreement as detailed in its response of 8/28/17 and looks forward to a revision which reflects this change.

*Because the scope of the IAOC does not encompass remedy selection, NDEP proposes to add the following modified language from paragraph II.D of the Deferral Agreement to the IAOC Appendix B, the Statement of Work for Remedial Investigation and Feasibility Study (RIFS SOW), in Section 8 pertaining to Remedial Action Objectives, as follows:*

*"ARC will develop RAOs that are consistent with the EPA Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA and the following provisions:*

- ☐ *Section 121(d) of CERCLA;*
- ☐ *National Contingency Plan (NCP) at 40 CFR § 300.430(e);*
- ☐ *Protective of human health and the environment, as generally defined for individual human exposure by an acceptable risk level for carcinogens between  $10^{-4}$  and  $10^{-6}$  (using  $10^{-6}$  risk level as the point of departure for determining remediation goals for alternatives) and for non-carcinogens a Hazard Index of 1 or less, and no significant adverse impacts to ecological receptors consistent with the NCP at 40 CFR § 300.430(e)(2)(i)(A); See, 1995 Guidance, p.7;*
- ☐ *Ensure that groundwater is restored to its beneficial use, consistent with the NCP, 40 C.F.R. § 300.430(a)(1)(iii)(F), unless an ARARs waiver is justified consistent with the requirements of CERCLA section 121(d)(4)(c), 42 U.S.C. § 9621(d)(4), 40 C.F.R. § 300.430(f)(1)(ii)(C), or NAC 445A.22725; and*
- ☐ *Evaluate the extent to which Maximum Contaminant Level Goals or Maximum Contaminant Levels for groundwater established under the Safe Drinking Water Act, 42 U.S.C. § 300f et seq., are considered legally applicable or relevant and appropriate requirements under section 121(d)(2)(A)(i) of CERCLA for any portion of the affected groundwater aquifer that is a current or potential source of drinking water based on the factors in 40 C.F.R. § 300.400(g)(2) during selection of remedial action goals in the feasibility study. 40 C.F.R. §§ 300.430(e)(2)(i)(B),(C)."*

Other portions of paragraph II.D. from the draft Deferral Agreement are not applicable to EPA's concerns regarding pre-selection or protectiveness of the groundwater remedy, since EPA's original comments pertain to restoration of groundwater and attainment of MCLGs in groundwater remedial actions. The language proposed above addresses these concerns directly, insofar as the completion of Feasibility Studies that are the subject of the IAOC.

2. Pit Lake OU2: EPA appreciates NDEP's clarification that the language in the IAOC RIFS SOW is not intended to preclude preparation of a baseline human health risk assessment. In light of this clarification EPA believes the following change is necessary to the IAOC RIFS SOW (Section 7.6) (Page 15). Delete the following paragraph as indicated in strikeout text below:

~~According to NDEP guidance (Pit Lake Water Quality Characterization Program, NDEP Profile III, May 2014), a baseline HHRA is not required for OU-2, as risks are limited to physical (i.e., fall from steep slopes, loose terrain) rather than chemical hazards and access to the pit will continue to be prohibited. A technical memorandum will be drafted for NDEP review documenting the lack of public access to the pit and incomplete exposure pathways for humans.~~

NDEP does not agree that it is necessary to strikeout the paragraph as requested by EPA. The language does not preclude preparation of a baseline human health risk assessment. To clarify that NDEP is not precluding preparation of an HHRA for the Pit Lake OU2, NDEP proposes making the following addition to Section 7.6 of the RIFS SOW:

"According to NDEP guidance (Pit Lake Water Quality Characterization Program, NDEP Profile III, May 2014), a baseline HHRA is not required for OU-2, as risks are limited to physical (i.e., fall from steep slopes, loose terrain) rather than chemical hazards and access to the pit will continue to be prohibited. A technical memorandum will be drafted for NDEP review documenting the lack of public access to the pit and incomplete exposure pathways for humans. NDEP will make a determination of the scope of any risk assessment that may be needed as part of its review and approval, or approval with modifications, of the human health risk assessment workplan and technical memorandum."

#### B. CERCLA Protectiveness (Risk Assessment)

1. EPA agrees with NDEP's proposal to address EPA's specific concerns on risk assessment in specific sections of the IOAC RIFS SOW as discussed below.

Comment noted.

2. EPA believes, to avoid misinterpretation, it is necessary to include specific language from the NCP in the following sections of the IAOC RIFS SOW:

(Section 6.5) (Page 10) and (Section 7.4) (Page 14). Specifically, make the deletions identified as strikeout text below and add the italicized text from the NCP.

Section (6.5) (Page 10):

ARC will perform human health risk assessment (HHRA) and screening level risk assessment (SLERA) in accordance with the Order and this SOW. The risk assessments will be conducted according to NDEP requirements and direction and USEPA risk assessment guidance, and will consider current and future land-uses. ~~institutional controls, and groundwater use restrictions.~~ *ARC shall conduct a site-specific baseline risk assessment to characterize the current and potential threats to human health and the environment that may be posed by contaminants migrating to ground water or surface water, releasing to air, leaching through soil, remaining in the soil, and bioaccumulating in the food chain.* This SOW text describes combined deliverables for certain OUs and for certain HHRA and SLERA Work Plans and Reports; however, if combination of such deliverables is likely to result in unnecessary delays to the project or if deemed technically appropriate or necessary, ARC may elect to sequence the deliverables individually (i.e. split HHRA and SLERA deliverables and/or split deliverables by OU).

*NDEP acknowledges that a baseline risk assessment performed in accordance with EPA guidance evaluates risks that may be present if no remediation or institutional controls were applied at a site. However, EPA guidance also directs that reasonable assumptions about future land use, including those based on institutional controls, should be considered in risk assessment and the remedy selection process. As stated in EPA's May 25, 1995 OSWER Directive No. 9355.7-04 ("Land Use in CERCLA Remedy Selection Process"):*

*"EPA should gain an understanding of the reasonably anticipated future land uses at a particular Superfund site to perform the risk assessment and select the appropriate remedy." (p. 4)*

*"Future land use assumptions allow the baseline risk assessment and the feasibility study to focus on the development of practicable and cost-effective remedial alternatives, leading to site activities which are consistent with the reasonably anticipated, future land use." (p. 6)*

*Sources and types of information that may aid EPA in determining the reasonably anticipated future land use include, but are not limited to: ...*

- institutional controls currently in place*
- Federal/state land use designation" ... (p. 5)*

EPA's follow-up March 17, 2010 OSWER Directive 9355.7-19 on this issue ("Considering Reasonably Anticipated Future Land Use and Reducing Barriers to Reuse at EPA-lead Superfund Remedial Sites") confirms that:

"Another opportunity to consider the reasonably anticipated future land use is during the Superfund site baseline risk assessment." (p. 5)

Further, as noted previously, EPA performed qualitative, rather than quantitative, evaluations of exposure to on-site workers to drain-down fluids and tribal receptors to OU-8 when completing the OU-8 human health risk assessment. NDEP acknowledges this type of qualitative approach may be applicable to certain exposure pathways on other parts of the Site and that EPA's determination on whether to conduct a qualitative evaluation relied in part on reasonable assumptions related to access and institutional controls. See the following language excerpted from Page ES-3 from the October 2016 Final Baseline Human Health Risk Assessment, Anaconda Arimetco Operable Unit Heap Leach Pads and Drain-down Fluids:

"In addition, exposure to tribal receptors and agricultural receptors is likely to be minor through ingestion, dermal contact, external radiation and inhalation of dust; therefore, they were qualitatively evaluated in this BHHRA."

For an on-site worker, exposure to drain-down fluids or surface water in ponds, basins, and ditches is likely to be accidental or very brief because drain-down fluids are contained in lined ponds or ditches that have steep slopes or other features that limit or discourage contact. Therefore, this pathway is qualitatively evaluated in this BHHRA. The drain-down fluids have low pH and contain high concentrations of metals, inorganics, and radionuclides. All construction, maintenance, and operation and maintenance work is required to be performed by on-site Occupational Safety and Health Administration and/or Mine Safety and Health Administration qualified workers whose training and experience will limit exposure to surface water hazards through implementation of a health and safety plan."

Therefore, NDEP considers it appropriate to consider institutional controls and groundwater use restrictions during performance of the human health risk assessment. Consideration of institutional controls and groundwater use restrictions will not be used as a basis for eliminating exposure scenarios from the baseline human health risk assessment, but they should be considered, as EPA did during completion of the OU-8 HHRA. NDEP does not propose any changes to the text of SOW.

Section (7.4) (Page 14):

ARC will perform human health risk assessment (HHRA) and screening level risk assessment (SLERA) for OU-2, OU-4b, OU-5, and OU-6 in accordance with the Order and this SOW. The risk assessments will be conducted according to NDEP requirements and direction and USEPA risk assessment guidance, and will consider current and future land-uses. ~~institutional controls, and groundwater use restrictions.~~ *ARC shall conduct a site-specific baseline risk assessment to characterize the current and potential threats to human health and the environment that may be posed by contaminants migrating to ground water or surface water, releasing to air, leaching through soil, remaining in the soil, and bioaccumulating in the food chain.* This SOW text describes combined deliverables for certain OUs and for certain HHRA and SLERA Work Plans and Reports; however, if combination of such deliverables is likely to result in unnecessary delays to the project or if deemed technically appropriate or necessary, ARC may elect to sequence the deliverables individually (i.e. split HHRA and SLERA deliverables and/or split deliverables by OU).

*See NDEP response to comments on Section 6.5, Page 10 above.*

3. EPA appreciates NDEP's commitment to characterize the VLT aka Oxide Tailings prior to use of VLT as cover material. EPA's rationale for additional characterization of OU6 (Oxide Tailings), briefly stated, arises from these findings: *Revised Data Summary Report for the Characterization of Potential Cover Materials*, Attachment 4, June 10, 2107, reports that application of the Meteoric Water Mobility procedure (MWMP) to VLT material resulted in 7 out of 10 VLT samples exceeding the MCL for uranium; and groundwater data from monitoring wells B/W-74 and HLP-08 located adjacent to the oxide tailings aka VLT indicate levels of uranium over 10 times the MCL (*Third Quarter 2016 Groundwater Monitoring Report*, July 21, 2017). Agreement between NDEP and EPA that OU6 needs further characterization requires the deletions identified as ~~strikeout text below~~ (IAOC RIFS SOW) (Section 7.4) (Page 14):

~~The purpose of the RI for this OU is to characterize the tailings materials and other structural units with the limits of the Oxide Tailings OU boundary. A significant number of VLT samples have been collected and analyzed in support of cover materials assessment and for various EPA and/or NDEP approved Site construction activities. Given the significant quantity of existing data, the homogeneity of this material type, and no indication of groundwater impacts from OU-6, further characterization work is not expected for this OU.~~

*It is not apparent to NDEP at this time that additional field characterization is required for OU-6. As stated previously, NDEP will review the RI Sampling and Analysis Plan for this OU and make a determination as to whether additional characterization is required to address leaching or other concerns. NDEP does not interpret the groundwater data from B/W-74 and HLP-08 as necessarily indicative of groundwater impacts from OU-6. Other potential area sources co-*

located with OU-6 in the area and up-gradient of B/W-74 and HLP-08 potentially contribute to the detections in B/W-74 and HLP-08. Additional analysis is required to determine whether the MWMP results (EPA was apparently citing to the Attachment 4 of the June 10, 2011 Revised Data Summary Report for the Characterization of Potential Cover Materials) are indicative of actual groundwater impacts from OU-6. NDEP again notes that the number of samples collected to characterize OU-8 Heap Leach Pads was scaled by EPA in part based on the relatively homogenous nature of these materials. NDEP does not propose any changes to the text of the SOW.

4. EPA acknowledges and appreciates NDEP's response that under certain circumstances it will be appropriate to include specific tribal exposure scenarios in human health risk assessments performed at the Site.

Comment noted.

### C. Tribal Participation

1. Walker River Paiute Tribe. EPA appreciates NDEP's commitment to work with the Walker River Paiute Tribe and Atlantic Richfield to recommend an appropriate level of financial assistance. To reflect this commitment IAOC will need to be amended to: add WRPT wherever YPT is mentioned in Section E.72.b.; remove the \$100,000 reimbursement limitation; and remove language that Respondent shall not be responsible to payment of any Future Response Costs incurred by the Division in providing financial assistance to WRPT, YPT, or any community group.

In response, NDEP proposes to amend the language in paragraph 72.b as follows:

"Because EPA does not have the authority to award Technical Assistance Grants at sites that are not on or proposed to the NPL, and in order ensure that members of the YPT, WRPT, and members of the surrounding community are able to acquire assistance to interpret information with regard to the performance of the Work and implementation decisions at relevant portions of the Site during the performance of the RI/FS and the Remedial Action, the Division shall provide resources or direct technical assistance to the YPT, WRPT, and a community organization that meets EPA eligibility requirements for a Technical Assistance Grant at 40 CFR Part 35 Subpart M. Costs incurred by the Division in providing such resources and technical assistance constitute Future Response Costs to be reimbursed under Section XVII (Payment of Response Costs), provided that Respondent's reimbursement obligation under this sub-Paragraph for all technical assistance provided to the YPT shall be limited to \$100,000, to the WRPT shall be limited to \$50,000, and to the community shall be limited to \$50,000. The Division may request that Respondent consent to increase the reimbursement limitations to account for reasonable additional costs incurred by

the Division in providing technical assistance to the YPT, WRPT, and the community in accordance with the Community Involvement and Participation Plan, which consent shall not be unreasonably withheld. Respondent shall not be responsible for payment of any Future Response Costs incurred by the Division in providing technical assistance to any other tribal government or community group, including, without limitation, the Walker River Paiute Tribe, if any. The Division shall separately track, account for, and bill for its Future Response Costs relating to the provision of technical assistance to the Yerington Paiute Tribe-YPT, WRPT, and community under this sub-paragraph. The \$100,000 reimbursement limitations for technical assistance shall no longer apply once a future record of decision is issued for additional remedial action at the Site outside of the ROD-1 Boundary and beyond what is selected in the ROD-1 and further described in the RD/RA SOW."

2. Yerington Paiute Tribe. EPA appreciates NDEP's clarification and commitment that financial assistance will be provided to YPT in addition to any separate technical assistance provided by NDEP. To be consistent with the commitment in item C.1. above, such commitment would also need to extend to WRPT.

NDEP agrees. No changes proposed to text beyond that included in C.1 above.

#### D. Technical Conclusions

1. OU1 (Groundwater) / Plume Stability. EPA appreciates NDEP's commitment to add the plume stability methods of analysis listed in EPA's comment of 7/27/17. Consistent with this commitment, the IAOC RIFS SOW (Section 6.1(b)) (Page 7) should be revised to present the full list of methods provided by EPA in its comment.

NDEP believes these additional plume stability methods of analysis fit within the general description language "other lines of evidence such as..." already included in the text of Section 6.1(b) the SOW. NDEP commits to including these methods as part of our review and approval, or approval with conditions, of the Plume Stability Technical Memorandum and into future performance evaluations of any groundwater remedy implemented at the Site. NDEP does not propose any changes to the SOW text.

2. OU2 (Pit Lake). See EPA response in item A.2. above.

See NDEP response to item A.2. above.

3. OU6 (Oxide Tailings aka VLT). See EPA response in item B.2. above.

See NDEP response to item B.2. above.

4. OU7 (Wabuska Drain). EPA disagrees that the MOU is the appropriate document to address the technical approach to the OU7 RIFS. Pending completion of the Remedial Investigation for all of OU7, including portions on Tribal land, statements as to the limits of the Remedial Investigation are premature. The following deletion to the text of the IAOC RIFS SOW (Section 6.4) (Pages 9-10) is necessary (see strikeout text below):

~~Results for soil samples collected within OU 7 and the Wabuska Drain reported detectable concentrations of COI. Data within the January 3, 2017 Wabuska Drain (OU 7) Field Sampling and Analysis Plan Data Summary Report and Conceptual Site Model Update preliminarily indicate that there is no evidence of percolation of COIs through the vadose zone to groundwater within drain alignments, that elevated concentrations of COIs originating from site sources appear to be limited to the drain area south of Luzier Lane, and that north of Luzier Lane COI concentrations are at background levels (including levels that are most likely attributable to agricultural practices).~~

*NDEP's objective was not to include a specific technical approach to addressing the OU-7 RIFS in the MOU. NDEP proposes that a process be developed for elevating issues of concern related to consistency for data collection and analysis for OUs that may span jurisdictions. While EPA has indicated that contamination from the Site on Tribal land will be subject to EPA and Tribal jurisdiction, and that contamination from the Site that is not on Tribal land will be subject to NDEP jurisdiction, EPA has not outlined a process for how to resolve inconsistent approaches to collecting and evaluating data for OUs that may span jurisdictions (e.g. OU-7 and OU-1). For example, different approaches to collection of data related to OU-7 and the approach to determining background concentrations or potential third-party contributions, could result in different remedial decisions based on different criteria. Determination of background or third-party contributions should follow a consistent methodology regardless of jurisdiction and inconsistencies should be reviewable by the EPA, including the option of review before the Regional Administrator.*

*NDEP believes the statements in the SOW are appropriately qualified (i.e. use of terms "preliminarily indicate" and "appear") and not premature. NDEP does not propose any changes to the SOW text as proposed by NDEP.*

The above change will also necessitate the following change to the language in the IAOC RIFS SOW (Section 6.4) (Page 10) (delete strikeout text and add italicized text):

Based upon this supporting information, the following SOW tasks are anticipated ~~to complete as part of~~ the site characterization activities for OU-7: ...

*NDEP agrees to make the requested change as suggested.*

## E. Definitions

1. Definitions of “CERCLA Protective.” EPA appreciates NDEP’s response and agrees to the addition of text to the IAOC as discussed in Item A.1. above.

See NDEP Response to Item A.1. above.

2. Definitions of “Site.” EPA appreciates NDEP’s response and looks forward to a revision which reflects this change.

NDEP proposes to modify the following language in these specific sections of the IAOC and SOW for RIFS. NDEP proposes to use the definition of Mine Site Boundary, which is already defined in the IAOC. No changes are proposed to the SOW for RDRA.

- A. IAOC Paragraph 70. “Groundwater Interim Measures, which may include enhanced Institutional Controls, shall, to the extent practicable, be consistent with the objectives of, and contribute to the performance of, any long term solution at the Site. The Division shall not require, and Respondent shall not be obligated to perform, active groundwater remediation as a Groundwater Interim Measure under this Section VIII.D. Groundwater Interim Measures that may be selected by the Division include, subject to an evaluation of water rights and hydrological considerations: (a) additional ~~on Site~~ source control measures within the Mine Site Boundary; (b) changes to ~~off Site~~ agricultural practices outside the Mine Site Boundary, including irrigation improvements, movement or elimination of irrigation pumping wells, reduced pumping rates, and ditch lining; (c) delivery of bottled water; (d) domestic or municipal well-head treatment; and (e) additional disconnections of domestic wells and further extensions of City Water System service.”
- B. RIFS SOW, Section 3.4 Closure Management Unit (CMU) Definitions and Implementation.

**TABLE 1: CMU Relationship to OU**

| <b><u>General Description of the Portions of Areas Included in the CMU</u></b>   | <b><u>Portions of OUs included in the CMU</u></b> |
|--|---|
| <u>Evaporation ponds, northern portion of the sulfide tailings, Wabuska Drain, and <del>on Site and off Site</del> groundwater</u> | <u>OU-1, OU-4 (4a and 4b), OU-7</u>               |

- C. RIFS SOW, Section 6.1 OU-1 Groundwater, Page 6

“The purpose of the Site-wide Groundwater RI is to characterize and monitor the groundwater within and downgradient of the Mine Site Boundary, as defined in

the Order. The Groundwater OU underlies the other OUs identified in this SOW, and elements of the other OUs may be integrated with this Groundwater OU. In this SOW, the term “Site-On-Property” refers to the area within the ~~the~~ Mine ~~Site~~ ~~Site~~ ~~Boundary~~ that encompasses the area where mining and ore beneficiation activities have occurred. The term “Off-Property” refers to areas outside the Mine Site Boundary where OU-1 groundwater RI activities have been conducted. The term “Study Area” refers to a larger area encompassing both ~~on Site-On-Property~~ and ~~off Site-Off-Property~~ locations where OU-1 groundwater RI activities have been conducted.”

D. RIFS SOW, Section 6.1 OU-1 Groundwater, Page 7, Plume Stability Technical Memorandum

“This memorandum is intended to provide the methodology and results of an evaluation of the stability of the groundwater plume ~~both on Site and off Site.~~”

E. RI/FS SOW, Section 6.1 OU-1 Groundwater, Page 8, Groundwater Monitoring Optimization Technical Memorandum

“The monitoring recommended by this memorandum will continue until ~~the implementation of the remedial action for on site and off site groundwater is selected and remedy implementation begins.~~ The final monitoring requirements during remedy implementation and following remedy implementation will be provided during the FS and will include the performance evaluation criteria within separate ~~on site and off site~~ On-Property and Off-Property groundwater performance monitoring protocols.”

F. Schedule

1. EPA notes NDEP’s disagreement with EPA’s comment. EPA continues to advocate for addressing off-property groundwater contamination sooner rather than later.

NDEP understands EPA’s position that off-property groundwater contamination should be addressed as quickly as possible. NDEP remains concerned about potential delays associated with selecting the final remedy for off-property groundwater contamination given the mixed use and effects off-property groundwater pumping could have on plume stability and dynamics. NDEP believes it is more realistic to address on-property sources of contamination prior to selecting a final off-property groundwater remedy. NDEP further believes the schedule it has proposed will address groundwater expeditiously and that the interim measures provisions in paragraphs 67-71 are adequate to address potential migration of contaminated groundwater that may result in any exposure while response activities proceed. Paragraph 137 of the IAOC also preserves NDEP’s ability to take enforcement actions as needed. NDEP does not propose any changes to SOW text. NDEP also notes that groundwater monitoring results and preliminary assessment of plume

dynamics performed to date indicate that the downgradient area of mine-impacted groundwater is not expanding.

G. Interim Administrative Settlement Agreement and Order on Consent (IAOC)

1. Page 4, Para 2 and 3. EPA appreciates NDEP's commitment to modify the IAOC to reflect ARC consent to jurisdiction under each authority exercised by NDEP and looks forward to a revision which reflects this change.

EPA's deferral guidance requires it to evaluate the State's statutory, regulatory, and administrative provisions for protectiveness and enforceability. Pursuant to Section II(A) of the Deferral Agreement, EPA will find that Nevada's state authority under NRS 445A and 459 offers sufficient protectiveness and enforceability to conduct the clean-up under the standards provided for in the Deferral Agreement. NDEP expects the cleanup after deferral to be conducted under its statutes and regulations. NDEP is not aware of any statutes or regulations that grant it authority to regulate and enforce the cleanup under CERCLA, however, it suggests modifying the language of the IAOC to require ARC's consent to jurisdiction under all applicable sections of NRS and CERCLA.

NDEP proposes to modify Paragraph 2 as follows:

"The Division is exercising its jurisdiction over this matter pursuant to Section 105(h) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9605(h); the National Priorities List Deferral Agreement to be entered between EPA and the Division ("Deferral Agreement"); and all legally applicable sections of Nevada Revised Statutes ("NRS") Chapters 445A, 445B, 459, and 519A; and the remaining sections CERCLA, 42 U.S.C. §§ 9601 et seq."

NDEP proposes to modify Paragraph 3 as follows:

"Respondent has consented to the Division's jurisdiction under each authority lawfully exercised by the Division including all applicable sections of ~~pursuant to the~~ NRS and CERCLA; Section 105(h) of CERCLA; and the Deferral Agreement, over Respondent regarding the content of this Settlement and its jurisdiction to enter such agreements. Respondent shall not challenge the terms of this Settlement or the Division's jurisdiction to enter and enforce this Settlement; however, Respondent does not waive its right to challenge the Division's interpretation of any terms or conditions of this Settlement through Dispute Resolution in Section XVIII (Dispute Resolution)."

2. Page 5, Section 1, Para 6. EPA appreciates NDEP's agreeing to strike the words "adequate level of" from line 2 in the interest of moving forward.

NDEP proposes to modify Paragraph 6 as follows:

"Consistent with the Deferral Agreement, once executed, selection and implementation of a final remedy that will provide ~~an adequate level of~~ CERCLA Protectiveness will be the guiding principle for remedy decisions at the Site, including any decisions made by the Division based on the RI/FS."

3. Page 7, Definition of CERCLA Protective. EPA appreciates NDEP's commitment to address this issue per the response in item A.1. above.

As explained in our response to comment A.1. above, NDEP plans to include portions of paragraph II.D of the Draft Deferral Agreement in the RIFS SOW. NDEP does not propose any changes to the IAOC text.

4. Page 8, Definition "k." (Deferral Agreement). While NDEP's response refers to the (Draft) Deferral Agreement, the IAOC as drafted includes language which is unacceptable to EPA, both in the IAOC and in the (Draft) Deferral Agreement. Please see EPA's most recent redraft of the (Draft) Deferral Agreement. EPA looks forward to a revision of the IAOC language which will incorporate the language in the (Final) Deferral Agreement.

Consistent with NDEP's proposed changes to the Deferral Agreement termination language, NDEP proposes the following revised language for definition "k" in the IAOC:

"Deferral Agreement" shall mean the National Priorities List Deferral Agreement to be entered into between the Division and EPA for the Site within 60 days of the Effective Date of this Settlement, and describing, among other things: (i) the terms by which EPA has agreed to defer listing of the Site on the NPL in accordance with Section 105(h) of CERCLA, 42 U.S.C. § 9605(h), while the Division completes and/or oversees necessary investigations and response actions at the Site, (ii) the steps the Division will take to ensure that adequate response actions are completed at the Site, and (iii) the ~~limited~~ conditions under which EPA or the Division may terminate the Deferral Agreement or separately require further response actions at the Site."

NDEP also proposes to change paragraph 12 of the IAOC as follows:

"In the event that: (a) the Division and EPA fail to finalize and execute the Deferral Agreement within 60 days of the Effective Date of this Settlement; or (b) following finalization and execution of the Deferral Agreement, (i) either the Division or EPA terminates the Deferral Agreement, and (ii) EPA orders, pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606, or otherwise requires that Respondent perform any response actions at the Site, either Party may immediately and unilaterally terminate

this Settlement by providing written notice to the other Party. The Division shall not terminate the Deferral Agreement unless it first determines and provides written notification to Respondent that: (a) adequate funding provided by Respondent for completion of the Remedial Action has become unavailable prior to Certification of Remedial Action Completion pursuant to Paragraph 172; (b) Respondent materially fails to perform any Work required by this Settlement, in a CERCLA Protective manner, or otherwise in compliance with applicable federal and state law, and the Division and Respondent cannot reach resolution on a dispute or Respondent is not responsive to the Division's enforcement action; (c) there has been a material change in conditions or circumstances such that the Division's authorities and programs are no longer sufficient to manage the Site; (d) the Remedial Action is unreasonably delayed; ~~or~~ (e) performance of the Remedial Action is inconsistent with the Deferral Agreement; or (f) there is another reason to do so that is reasonable, appropriate, and necessary to prevent an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from the Site. As to the conditions in items (a), (b), (d), ~~and~~ (e), and (f) in the prior sentence, the Division shall provide Respondent an opportunity to cure the condition within 30 days of notice to Respondent before terminating the Deferral Agreement.

5. Page 12, Definition "vv." (Site). EPA agrees with NDEP that the proposed changes to item E.2. above (and, EPA adds, item A.1. above) will address EPA's comment.

Comment noted. See above response to A.1. and E.2. with proposed text changes. No further text changes are proposed by NDEP.

6. Page 15, Para 23. (Findings of fact.) EPA appreciates NDEP's response and, in the interest of moving forward, EPA has focused its response on specific language in the form of specific comments to the IAOC RIFS SOW.

Comment noted. No further text changes are proposed by NDEP.

7. Page 17, Para 34. (Findings of fact / extent of mine-impacted groundwater). EPA appreciates NDEP's response and, in the interest of moving forward, EPA has focused its response on specific language in the form of specific comments to the IAOC RIFS SOW.

Comment noted. No further text changes are proposed by NDEP.

8. Page 25, Para 57. (CMUs / restoration alternatives.) EPA appreciates NDEP's commitment to work with ARC on revisions to this language and EPA looks forward to revisions which reflect these changes.

The text in this section is consistent with EPA's model RI/FS AOC, dated September 9, 2016, except for two modifications which limit remedial investigations of OU's to

those that have not already been completed and require the feasibility study to evaluate remedial action alternatives for groupings of CMU's consistent with the RI/FS statement work. NDEP does not propose any changes to this paragraph of the IAOC.

9. Pages 25-26, Para 59. (Institutional controls.) EPA appreciates NDEP's response and, in the interest of moving forward, has no specific changes to request.

Comment noted. No further text changes are proposed by NDEP.

10. Page 26, Para 60. (Copies of deliverables to EPA.) EPA appreciates NDEP's response and, in the interest of moving forward, has no specific changes to request.

Comment noted. No further text changes are proposed by NDEP.

11. Page 29, Paras 67-71. (Groundwater interim measures.) EPA appreciates NDEP's response and, in the interest of moving forward, has no specific changes to request.

Comment noted. No further text changes are proposed by NDEP.

12. Page 31-31, Para 72(b). (Technical assistance / funding to YPT). Please see discussion under items C.1. and C.2. above.

Please see NDEP proposed changes in Item C.1. above.

13. Page 34, Paras 77 and 79. (Response actions outside of OUI boundary.) EPA appreciates NDEP's response and, in the interest of moving forward, has no specific changes to request.

Comment noted. No further text changes are proposed by NDEP.

14. Page 37, Para 88. (Approval of deliverables by default.) Although the approach in the IAOC is not one EPA would follow, EPA respects NDEP's preference in this area and, in the interest of moving forward, has no specific changes to request.

Comment noted. No further text changes are proposed by NDEP.

15. Page 53, Para 136. (Covenant from NDEP). EPA maintains its position that covenants should be limited to the work performed.

Paragraph 136 provides a covenant not to sue, order, or take administrative action for the Work, Future Response Costs, and the OUs and CMUs addressed by the Remedial Action. EPA has requested the covenant only apply to the Work. First, Future Response Costs relate specifically to the Work, so it would seem logical that a covenant granted for the Work extend to the Division's costs in overseeing

implementation of that Work. Second, since the OUs and CMUs addressed by the Remedial Action are part and parcel of the Work NDEP does not take issue with ARC's request for covenant related to the OUs and CMUs addressed by the Remedial Action. NDEP appreciates any concern that IAOC's reference to OUs and CMUs is too broad as ROD-1 may only impact parts of certain OUs and CMUs at the Site and suggests adding language to this section, which indicates that the covenant attaches only to the OUs and CMUs, or parts thereof, addressed by the Remedial Action.

To clarify that the covenant only applies to those portions of OUs and CMUs addressed by the Remedial Action, NDEP proposes the following changes to paragraph 136:

"Except as provided in Section XXII (Reservations of Rights by the Division), the Division, on behalf of itself and any other State agency with jurisdiction over the matters addressed by this Settlement, covenants not to sue, order, or to take administrative action against Respondent relating to the Work, Future Response Costs, and those portions of OUs and CMUs addressed by the Remedial Action pursuant to Sections 107(a), 113, and 310 of CERCLA, 42 U.S.C. §§ 9607(a), 9613, and 9659; Sections 3004(u) and (v) and 7002 of RCRA, 42 U.S.C. §§ 6924(u) and (v) and 6972; or any State law enacted pursuant to those authorities. [KEEP REST OF PARAGRAPH SAME NO CHANGES]"

16. Page 58, Para 151. (Contribution protection.) EPA maintains its position that contribution protection be limited to the work performed. See item I.15. directly above.

See NDEP response to I.15 with regard to Future Response Costs.

To clarify that contribution protection only applies to those portions of OUs and CMUs addressed by the Remedial Action, NDEP proposes the following changes to paragraph 151:

"The Parties agree that this Settlement constitutes an administrative settlement pursuant to which Respondent has, as of the Effective Date, resolved liability to the State within the meaning of Sections 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for the "matters addressed" in this Settlement. The "matters addressed" in this Settlement are the Work and Future Response Costs, Division O&M Costs, and Division RI/FS Costs, and, with respect to the those portions of OUs and CMUs addressed by the Remedial Action, all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with ~~such those~~ portions of OUs and CMUs addressed by the Remedial Action; [KEEP REST OF PARAGRAPH SAME NO CHANGES]"

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H. Statement of Work for Site-Wide RI/FS (IAOC RIFS SOW)

1. Page 4, Table 1. (Description of OUs / CMUs.) See EPA response in item G.15. above.

See NDEP responses to item G.15 above. No additional changes proposed for text or figures of RIFS SOW.

2. Page 6, Para 6.1. (Use of term “Site.”) See EPA response in item E.2. above.

See NDEP proposed text changes in item E.2. above.

3. Page 7, Para (b). (Plume Stability). See item D.1. above.

See NDEP response to item D.1. above. No further text changes are proposed by NDEP.

4. Pages 7-8. (Groundwater Monitoring Optimization). EPA appreciates NDEP’s response that EPA’s comment will be addressed in the production of the Groundwater Monitoring Optimization Technical Memorandum, a deliverable under the IAOC.

Comment noted. No further text changes are proposed by NDEP.

5. Page 9, Para 6.4. (OU7 Wabuska Drain.) See EPA response in item D.4. above.

See NDEP response to item D.4. above. No further text changes are proposed by NDEP.

6. Page 10, Para 6.5 (Risk Assessments.) See EPA response in item B.2. above.

See NDEP response to item B.2. above. No further text changes are proposed by NDEP.

7. Page 20, Schedule, Line 25. (Delivery date, FS Report for CMUs 1 and 3.) EPA notes NDEP’s disagreement with EPA’s comment. EPA continues to advocate for addressing off-property groundwater contamination sooner rather than later.

See NDEP response to item F.1 above. No further text changes are proposed by NDEP.

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I. Statement of Work for RD/RA of CMUs 2,4,5,6 &7 (IAOC RDRA SOW)

1. Section 1.2, 2<sup>nd</sup> bullet. (RD/RA “contemplated” under this SOW.) EPA appreciates NDEP’s response and, in the interest of moving forward, has no specific changes to request.

Comment noted. No further text changes are proposed by NDEP.

2. Section 1.3. (Activities implemented “in general consistency” with the ROD.) EPA believes, for the remedy to be consistent with CERCLA and the NCP, that work must be implemented consistent with the ROD, not “generally” consistent with the ROD, therefore the word “generally” must be stricken from the text.

NDEP proposes to make the following change to Section 1.3 of the RDRA SOW text.

**“Scope of the Remedy:** The Scope of the Remedy includes the following activities (Work) which will be implemented in general consistency with the ROD:”

3. Section 1.3. (a) and (b). (Not embedding design parameters into SOW.) EPA appreciates NDEP’s commitment to work with ARC to remove this specification from the IOAC RDRA SOW and revisit it during RD scoping.

NDEP proposes to make the following changes to Section 1.3(a) and (b) of the RDRA SOW text:

~~“...sized to accommodate no more than one acres of have an appropriate active evaporative surface area necessary per two gallons per minute (gpm) of to manage anticipated flows of HLP draindown fluid.”~~

4. Section 1.3 (b). (TENORM). EPA believes, for the remedy to be consistent with CERCLA and the NCP, that the following sentence must be added to the end of the paragraph: “Any work items in this paragraph that were not described in the ROD may require modifications to the ROD pursuant to the NCP § 300.435(c)(2).”

NDEP proposes to add the suggested language to Section 1.3(b) of the RDRA SOW text as follows:

“...are needed to accommodate the remedy design or to the extent that efficiencies can be gained in including such areas. Any work items in this paragraph that were not specifically described in the ROD may require either documentation (for non-significant or minor changes), explanation (for significant differences), or amendment of the ROD (for fundamental changes), pursuant to the NCP § 300.435(c)(2) and § 300.825.”

5. Section 2.1, first sentence. (Add WRPT to funding commitment.) EPA appreciates NDEP's commitment to work with ARC to modify this language and looks forward to a revision which reflects this change.

NDEP proposes to add the following language to Section 2.1 of the RDRA SOW as follows:

"NDEP has the lead responsibility for developing and implementing community involvement activities at the Site and providing technical assistance, to the extent necessary and appropriate, to the Yerington Paiute Tribe, the community, and the Walker River Paiute Tribe. "

6. Section 2.1, fourth sentence. (ARC support "may include" online access.) EPA appreciates NDEP's response and, in the interest of moving forward, has no specific changes to request.

Comment noted. No further text changes are proposed by NDEP.

7. Section 4.2 (f) and 5.2 (g). (Institutional controls / ICIAP.) EPA appreciates and concurs with NDEP's response that a separate Institutional Controls Implementation and Assurance Plan (ICIAP) may be needed for the first phase of OU8 remedy construction with the final ICIAP incorporating the first and final phases into a single document.

NDEP proposes the following changes to Section 5.2(g) of the RDRA SOW:

"(g) Revised and Updated Institutional Controls Implementation and Assurance Plan completed under Section 4.2(f) that incorporates CMUs 2, 4, 5, 6 and 7; and"

8. Section 8.4 (d), second sentence. (Language change re QAPP "applicable to the subject sampling.") EPA appreciates NDEP's commitment to work with ARC to make the necessary changes to the text and looks forward to a revision which reflects this change.

NDEP proposes the following changes to Section 8.4(d) of the RDRA SOW:

"A separate QAPP is not required to be submitted by ARC, if reference can be made within any PDCT Work Plan, FSP, or other sampling plan to an appropriate NDEP approved QAPP for other sampling and analysis work at the Site that is applicable to the subject sampling."

9. Section 8.4 (e). (Type of measurements / performance standards / RD work plan or IAOC RDRA SOW.) Although the approach in the IAOC RDRA SOW is not one EPA would follow, EPA respects NDEP's preference in this area and, in the interest of moving forward, has no specific changes to request

Comment noted. No further text changes are proposed by NDEP.

10. Section 8.4 (f) and (h). (Monitoring of cap erosion.) EPA appreciates NDEP's clarification.

Comment noted. No further text changes are proposed by NDEP.

11. Section 8.4 (i). (Add two subparts to ICIAP requirements). EPA appreciates NDEP's commitment to work with ARC to include EPA's suggested language and looks forward to a revision which reflects this change.

NDEP proposes the following changes to Section 8.4(i) of the RDRA SOW:

"(3) Description of the institutional controls required by the ROD, including mechanisms, objectives, locations to be included, and agencies or parties involved in implementation; (4) Plan and schedule for implementing institutional controls, including required administrative or legal processes."